Council on Postsecondary Education
Committee on Equal Opportunities
June 26, 2002

Grutter v. Bolinger
University of Michigan: Law School Admissions Policy
Sixth Circuit Court Decision: Race as Factor

A summary of the significant findings of the case is:

> State university law school's admissions policy was narrowly tailored to serve its compelling interest in achieving a diverse student body, and therefore its consideration of race and ethnicity in its admissions decisions did not violate Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act.

The University of Michigan law school developed an admissions policy that "seeks a mix of students with varying backgrounds and experiences who will respect and learn from each other."

The University of Michigan law school case is one of two University of Michigan cases testing whether race-based admissions programs violate the Equal Protection Clause of the Fourteenth Amendment or Title VI of the Civil Rights Act. The second case, Gratz v. Bolinger, currently is before the sixth circuit court of appeals.

The Grutter case is one of the first post-Bakke cases to directly test whether achieving a diverse student body is a compelling state interest sufficient to permit admissions decisions partially based on race. When race-based decisions are present, heightened scrutiny is applied. Generally, the federal courts have ruled that strict scrutiny is the test—whether a state has a compelling interest in the issue at hand. Correction of past discrimination is an example of a compelling state interest. The fifth circuit and third circuit struck down race-based admissions or student financial aid policies but the issue was not a desire to create a diverse student body. That issue was paramount in the Grutter case. The sixth circuit court of appeals felt that achieving diversity was a compelling state interest, that the use of race in making admissions decisions was narrowly tailored in the Michigan case, that the university had demonstrated that it tried other means to accomplish the goal of diversity, and that the program met all of the tests set out in the Bakke case.

It is too early to say what, if any, the implications are for the Kentucky postsecondary education institutions.

A copy of the opinion is included.

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6th Circuit head-butting

Two Kentucky jurists have become the hottest topic on the legal circuit.

I'm talking about the U.S. 6th Circuit Court of Appeals, where Judge Danny Boggs and Chief Judge Boyce Martin have butted up against each other in rather spectacular fashion.

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Current column

In order to get to the really good part, where the judges and their colleagues get downright ugly with each other, I have to tell you what the case is all about.

What we have here (in addition to a collision of judicial manners, civic ideology, political allegiance and personal styles) is the case called *Grutter v. Bollinger.*

It concerns the University of Michigan's procedures for admitting students to law school, and whether they help African-American, Hispanic and Native American applicants in a permissible way, for a permissible reason.

Martin and the majority ruled that they do.

Boggs, writing for the minority, said they don't, arguing that this is "a straightforward instance of racial discrimination by a state institution."

He thundered that "the intent of the framers of the policy, the statistics as to its impact, and effect, and the history of its inception all point unmistakably to a denial of equal protection of the laws."

For Martin, a judicial liberal-presumptive, this was a case in which it was easy to do what conservatives claim they want: rely on precedent. For him, the controlling case was *Regents of the University of California v. Bakke.* In his view, it clearly established that diversity is an allowable goal in choosing a public university's professional school students and that admissions policies can be, at least in part, race-conscious in order to achieve that goal.

Boggs said this interpretation reads too much into *Bakke,* which mainly was about striking down the very different UC-Davis approach to medical school admission.

So what *are* the University of Michigan's methods for admitting people to law school? Martin considers them "virtually identical" to the Harvard College plan examined favorably in *Bakke.*

First, all students who are admitted are qualified to do the work. The university does not reserve or set aside seats for any group, but it does treat race and ethnicity as a "plus" for some applicants. Each individual's file is assessed separately, considering such factors as "leadership, work experience, unique talents or interests and the enthusiasm of an applicant's letters of recommendation," along with class grades and Law School Aptitude Test (LSAT) score.

Michigan's goal is to admit a "critical mass" of under-represented minority students, who can contribute to classroom dialogue and not feel isolated -- who are free to discuss issues based on their personal experiences, and do not feel compelled to become spokespersons for their race.

The benefits of a diverse student body, according to the court majority in *Grutter*, are supported by "a wealth of legal scholarship."

Boggs and the three other dissenters insist the University of Michigan plan isn't as narrowly tailored as it must be to pass muster. They believe the school gives race and ethnicity such disproportionate weight that a *de facto* quota system results. They focus, of course, on the virtues of relying on grade point average and LSAT data to make admissions decisions.

Those who see themselves as products of the so-called meritocracy often are vested in the notion that there's something magical and decisive about test scores. But Judge Eric Clay, who agreed with Martin, said the dissenters ignored "the scholarly writings showing no correlation between these numerical credentials and success in law school or bar passage rates."

Further, he said their arguments were "unfounded and inflammatory" and advanced "the outrageous contention that the law school's policy allows for a minority applicant to put forth less effort than the otherwise similarly situated white applicant, and that somehow the minority will use his race to compensate for his lack of effort. There is nothing whatsoever in the record to support the allegation (that the policy) would be manipulated in this fashion by people of color or ethnicity."

The judicial temperature began to rise when one of the most emotional issues that divide liberal from conservative began to heat up this high-profile court case.

The radiators really began to clang, however, about the time it became obvious that a majority of the nine-judge panel hearing *Grutter* was going to rule for the University of Michigan.

Boggs apparently became vexed. So vexed that he did something really extraordinary. He attached a "Procedural Appendix" to his dissent, which in effect lambasted his fellow Kentuckian's handling of the matter.

That great mouthpiece of the right, the editorial page of *The Wall Street Journal,* wrote that "the details are too Byzantine to recount in full here," but the gist is that Martin is supposed to have "ignored the 'long-established rules' of the court in deciding how to deal with *Grutter.*" Judge Boggs is a Reagan appointee; Judge Martin was appointed by Jimmy Carter.

The *Journal said,* "According to Judge Boggs' account, corroborated by another judge, Judge

Martin assigned himself to the three-judge panel that was considering *Grutter,* bypassing the usual random selection process. He then delayed telling the court, which then had 11 active members, that the university had petitioned for a full court, or *en banc,* review. Instead, he waited until two Republican-appointed judges had taken senior status, thereby losing the right to sit in an *en banc* hearing.

"It's not unusual for judges to time their moves to senior status, so that they can participate in cases that interest them, and it's reasonable to assume that *Grutter,* which dealt with one of the most contentious legal issues of the day, would have been such a case."

The *Journal* admiringly quoted the conclusion of Boggs' all-but-explicit attack on Martin's stewardship: "Legitimacy protected only by silence is fleeting. If any damage has been done to the court, it is the work of the actors, not the reporters."

A grandiloquent conclusion it was, but, according to Martin's colleagues in the majority, wildly off the mark.

One of them, Judge Karen Nelson Moore, wrote that Boggs and his cohorts "have done a grave harm not only to themselves, but to this court and even to the Nation as a whole." She said the procedural disagreements didn't directly affect the legal issues and were "peripheral to the matter at hand." Further, she insisted the dissenters' claim that the outcome resulted from political maneuver and manipulation was "unfounded" and "baseless," and made her sad. The attack against Martin was "nothing short of shameful." Here's her take on the "Byzantine" detail:

1. Even if a different procedure had been followed, the case would have been heard by the same nine people who eventually heard it.

2. It's true that a June 4, 2001 order, holding in abeyance the request for an *en banc* hearing, was not circulated to the whole court. However, to make anything sinister of that is misleading. The order was not circulated to *any* judges at that time. It was signed by the clerk, and not issued at the direction of Judge Martin, or the two other members of the original *Grutter* panel.

3. The claim that rules or internal operating procedures were violated is "simply incorrect." Late in 2000, Martin had instituted a new policy on requests for initial *en banc* hearings, and it was followed in *Grutter.*

4. If Boggs and the judges on his side had moved quickly when the matter came to their attention, another procedure was available to them through which to address any complaints.

5. Martin often has added himself to a case panel rather than subject the decision to a random draw, in order to "avoid inconveniencing other circuit judges." This action was not unusual, and had not been the object of earlier objections.

6. The tardy complaints of the dissenters suggest "their primary complaint is with the outcome . . . rather than with the procedures that were followed."

Moore called Boggs' "Procedural Appendix" a "new low point in the history of the Sixth

Circuit."

Clay called it "an embarrassing and incomprehensible attack" on Martin and the integrity of the court. "This unfortunate tactic has no place in scholarly jurisprudence and certainly does not deserve to be dignified with a response," he said.

He then proceeded to respond anyway, saying the "unfounded allegations of impropriety, as to the course of this matter followed in reaching the *en banc* court, simply defy belief."

His conclusion? The outcome, despite "unfortunate and desperate attempts to portray the majority opinion as anything less," was "based upon nothing more than sound and scholarly deliberation."

Boggs hit back in his Appendix, insisting, "I absolutely deny that this judge has had *any* knowledge of, or that the Chief Judge has announced or admitted to, any such practice of inserting himself onto panels without a random draw."

He said the suggestion that he and his side were "in some way derelict in not *sua sponte* calling for an initial hearing *en banc* as soon as the appeal was filed is both remarkable and misses the point."

In a last grudging gasp, his Appendix said, "I do not contend that the legal opinions of any members of this court do not represent that judge's principled judgment in this case. . . . However, under these circumstances, it is impossible to say what the result would have been had this case been handled in accordance with our long-established rules."

Who is right?

Who is hero and who is goat?

Among the three other dissenters, only Judge Alice Batchelder put both feet down next to Boggs, arguing, "Unless we expose to public view our failures to follow the court's established procedures, our claim to legitimacy is illegitimate."

The dissent by Judge Ronald Gilman, who agreed with Boggs on the merits of the case, simply ignored the inflamed Appendix.

Judge Eugene Siler Jr. also agreed with Boggs on the merits of the case and didn't question the accuracy of his procedural complaints, but he dissociated himself from the Appendix, saying it was "unnecessary for the resolution of the case."

If I had been a member of this panel, I couldn't have ignored or condoned Boggs' tantrum. Our system of government, including its judicial branch, is supposed to be in the business of managing conflict, not escalating it.

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